United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7308

In The

United States Court of Appeals

For The Second Circuit

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

vs.

JEFFREY SNYDER, d/b/a J.S.N.Y. and ETNA PRODUCTS CO., INC.,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES:

REGULATIONS:

PUBLICATION:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,	:	
Plaintiff-Appellee,	:	Appeal No. 75-7308
v.	:	Appeal in 75 Civ. 2036 (S.D.N.Y.)
JEFFREY SNYDER, d/b/a J.S.N.Y., and ETNA PRODUCTS CO., INC.,	:	
Defendant-Appellants.	:	

BRIEF ON APPEAL FROM THE ORDER OF THE DISTRICT COURT GRANTING PLAINTIFF-APPELLEE'S MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF THE CASE

This is an appeal from an Order entered by the District Court for the Southern District of New York (Hon. Charles M. Metzner, D.J.) entered on May 15, 1975 (A-119)* granting the Motion (A-19) brought by plaintiff L. Batlin & Son, Inc. (hereinafter "Batlin") and mandating that defendants Snyder and Etna Products Co., Inc. (hereinafter, collectively, "Snyder") be enjoined pendente lite, from asserting the copyright here in issue (A-17), and affirmatively compelling them to cancel the recordation thereof with the United States Customs Service. In

*Joint Appendix references will be identified "A- " herein.

the underlying action, Batlin seeks a declaratory judgment as to the alleged invalidity and unenforceability of defendant Snyder's copyright (A-3).

In issue is a copyright on a plastic "Uncle Sam" bank designed, sculpted and molded on commission for Snyder and inspired by a metal Uncle Sam bank which had long been in the public do

Snyder sought to protect his version of the Uncle Sam bank by copyright and, following formal deposit with the Register of Copyrights (A-17), brought a copyright infringement action against E. Mishan & Sons, Inc. in the District Court for the Southern District of New York (75 Civ. 428). Snyder sought a preliminary injunction to enjoin further infringement by defendant Mishan in that action. In an Opinion dated February 13, 1975 (A-122), Judge Metzner denied that Motion, asserting that:

> "There is no original idea here... This idea is clearly in the public domain and is the same creative idea that exists in the antique banks." [Emphasis supplied] (A-126-27)

Defendant Mishan has, in that related proceeding, subsequently filed a Motion for Summary Judgment, seeking a declaration of invalidity of Snyder's copyright. While that Motion has been briefed, as of this date there has not been any determination in the related proceeding that the copyright here in issue is invalid.

In early February, 1975, Snyder initiated administrative proceedings to record the Uncle Sam bank copyright registration with the United States Customs Service to bar importation of infringing plastic Uncle Sam banks in accordance with the provisions of 17 U.S.C., Sec. 106, 108, 109. An order precluding such importations was promulgated by the Customs Service in April, 1975.

This Motion, which gave rise to the Order here on appeal, was brought on by Order to Show Cause on May 2, 1975 (A-19). On that date Judge Metzner issued a temporary restraining order restraining the Customs Service and Snyder from enforcing the importation exclusion order, pending determination of Batlin's Motion for Preliminary Injunction. Briefs and supporting affidavits (A-22, 33, 36) were thereafter filed by both parties and an evidentiary hearing was held on May 6, 1975 (A-48).

In agreeing to the requested preliminary injunction against enforcement of the exclusion order, Judge Metzner stated in a May 12, 1975 Opinion (A-114) that:

> "I find little probability that defendants' copyright will be found valid in a trial on the merits." (A-116)

On May 15, 1975 the Court below entered an Order (A-119) enjoining Snyder, pendente lite, "from further asserting, contending, claiming or alleging" that the copyright here in issue is valid and infringed, and "from enforcing any alleged rights" in and to the copyright, and further ordered Snyder "to

cancel the recordation thereof with the United States Customs Service". The present appeal is from the District Court's grant of that preliminary injunction and entry of the aforesaid Order (A-121).

THE FACTS

Cast metal savings banks incorporating an Uncle Sam figure standing atop a decorated, box-like platform have long been in the public domain. The design of such an article was the subject of U.S. Design Patent No. 16,728 granted on June 8, 1886 (A-14). A typical example of the prior metal Uncle Sam bank is in evidence in this proceeding as Exhibit 1.

Etna Products Co., Inc. is engaged in the business of importing and selling novelty items such as the Uncle Sam bank (Snyder Affidavit, A-36, para. 4), and Jeffrey Snyder is an officer of Etna (A-36, para. 2) and commissions the design and sculpting of novelty items which Etna thereafter markets (A-37, para. 5). In January 1974 Snyder saw one version of the metal Uncle Sam bank and, as the item appeared quite timely for marketing in connection with the U.S. Bicentennial, Snyder purchased it (A-37, para. 7).

In April, 1974 Snyder asked his Hong Kong buying agent whether it could produce a new plastic Uncle Sam bank for him based on the metal bank (A-37, para. 9). A high quality mold maker in Hong Kong was selected (A-37, para. 9). Sketches were made during a conference between Snyder, his buying agent and the

mold maker of a proposed reduced size plastic Uncle Sam bank, inspired by the antique metal Uncle Sam bank (which was 11 inches high) (A-38, paras. 8-12). A 10-inch high clay model of the proposed article was thereafter sculpted (A-38, para. 13). During a later meeting, Snyder, the buying agent and the mold maker decided to further modify the design and to further reduce its height to 9 inches (A-38, 39, para. 13). A prototype was accordingly sculpted (A-39, paras. 14-15). After Snyder approved the prototype, its design was utilized for preparation of the mold employed in the production of Snyder's copyrighted, commercial work (A-39, para. 15). An example of the copyrighted plastic bank is in evidence as Exhibit 2 herein.

Both Batlin's expert witness, Bloch (at A-65, li. 5 - A-66, li. 8) and Snyder's expert witness, Wurmbrand (at A-93-95 - A-103, li. 22 - A-104, li. 11) testified that the sculpting steps were necessary to produce Snyder's plastic bank and that a trained artist and sculptor had to have spent considerable time in designing and sculpting Snyder's bank*.

*Wurmbrand Testimony, A-104, li. 3-11:

"Q Would you say that it took him hours of work in front of the original to produce the copy? What would you estimate as to how long it would take you?

A It depends on the artist.

Q How long would it take you to do that?

A About a day and a half, two day work.

Q How would you rate that -- would that be an easier piece than you worked on or a more difficult piece?

A I would put it in between medium and difficult."

Because of the several design and sculpting stages through which Snyder's bank passed between the initial cast metal Uncle Sam bank and the final plastic version, because it was an artist or sculptor who performed the various stages in the creative process and his individual artistic judgments went into his contribution and in view of Snyder's desire to create a "good looking Uncle Sam bank", numerous changes were made in the shape and appearance of the plastic Uncle Sam bank as compared with the metal bank on which it was based (A-40-41, para. 20). The differences between the Snyder plastic Uncle Sam bank and the prior cast metal bank have been documented both in the Snyder Affidavit and by the testimony of both Batlin's and Snyder's expert witnesses during the May 6th evidentiary hearing (A-48). Thus, it is uncontroverted on the present record that the Snyder plastic Uncle Sam bank differs from the prior, public domain, metal Uncle Sam bank in at least the following respects:

(1) The Snyder plastic Uncle Sam bank is nine inches in height, whereas the prior metal Uncle Sam bank is 11 inches high, with corresponding proportional differences in the dimensions of the respective Uncle Sam figures, the supporting pedestals, and the carpet bags or satchels mounted thereon;[1]

(2) The shape and surface textures of the respective satchels differ from one another;[2]

---

1 Snyder Affidavit; A-40, para. 20

2 Snyder Affidavit; A-40, para. 20; (plaintiff's) Bloch, A-55, li. 21 - A-56, li. 10; (defendants') Wurmbrand, A-95, li. 15-18.

(3) The eagle figures on the front of the respective platforms of the Uncle Sam banks differ both in surface textures and in that the eagle on the metal bank holds arrows in its talons whereas the eagle on the plastic bank is perched on a branch, holding leaves;[1]

(4) The shape and appearance of the faces of the respective Uncle Sam figures differ[2], as does the shape of the ears[3] and hair styles;[4]

(5) The appearance of the clothing on the respective Uncle Sam figures differ, in particular with respect to the shape and textures of their hats[5], the shape and decorations on their bow ties[6], the shapes and folds of their shirt collars[7], the openings in their coats[8], and the lengths and separation or joinder of their pants cuffs[9];

(6) The overall anatomical shapes of the respective figures differ, for example, with respect to the proportions of their stomachs and abdomens[10], the delineation of their knees[11], and fingers[12], and the shapes of the left arms thereof[13]; and

---

1 Snyder, A-40, para. 20; Bloch, A-70, li. 3 - A-71, li. 5.
2 Snyder, A-40, para. 20; Wurmbrand, A-97, li. 21-23.
3 Wurmbrand, A-96, li. 8-10.
4 Snyder, A-40, para. 20; Wurmbrand, A-96, li. 11-18.
5 Snyder, A-40, para. 20.
6 Snyder, A-40, para. 20.
7 Snyder, A-40, para. 20.
8 Bloch, A-68, li. 23 - A-69, li. 16; Wurmbrand A-97, li. 2.
9 Bloch, A-72, li. 5 - A-73, li. 12; Wurmbrand, A-97, li. 9-19.
10 Wurmbrand, A-97, li. 24 - A-98, li. 7.
11 Bloch, A-74, li. 18 - A-75, li. 4.
12 Bloch, A-77, li. 17 - A-78, li. 4.
13 Snyder, A-40, para. 20.

(7) The mold parting or separating lines in the respective figures differ in location*.

These design differences were developed during the several steps from the antique metal Uncle Sam bank to the sketches thereof, from the sketches to the first reduced size clay model, and from the first reduced size clay model to the prototype for the copyrighted work, and were due to the esthetic contributions of the artists and sculptors involved.

The Snyder plastic Uncle Sam bank is produced in Hong Kong and bears the copyright notice " © J.S.N.Y.". Snyder's records indicate that the copyrighted work was first published in this country on October 15, 1974 (A-42, para. 24). The acts of copyright infringement in issue in this and the related Mishan proceedings quickly followed.

THE ISSUE ON APPEAL

The issue before this Court is whether, in light of the preceding facts regarding the nature and development of the copyrighted work, Judge Metzner abused his discretion by (1) concluding that Batlin had made a clear showing of the probability that Snyder's copyright would be found invalid after a trial on the merits, and (2) granting a preliminary injunction based thereon.

* Bloch, A-78, li. 14 - A-81, li. 17; Wurmbrand, A-98, li. 8-23.

ARGUMENT

The Court Below Abused its Discretion in Granting the Preliminary Injunction, Batlin Not Having Made any Clear Showing of its Probability of Success on the Merits and It Instead Appearing from this Record that Snyder's Copyright is Valid and Enforceable

As correctly observed by the Court below, in copyright cases a clear showing of the probability of success at a trial on the merits is a prerequisite to the grant of a preliminary injunction. Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (2 Cir. 1972); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2 Cir. 1969); and Uneeda Doll Co. v. Goldfarb Novelty Co., 373 F.2d 851 (2 Cir. 1967); cert. den., 389 U.S. 801. It is, however, respectfully urged that the Court abused its discretion when, in the face of the present record, it concluded as a matter of law that such a showing had been made.

A. Snyder's Version of the Uncle Sam Bank May be Regarded, for Copyright Classification Purposes, as Either a Reproduction of a Work of Art or as a Work of Art

17 U.S.C., Sec. 5 defines the various classifications of works on which statutory copyright may be obtained:

> "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:...
>
> "(g) Works of art; models or designs for works of art;
>
> "(h) Reproductions of a work of art...

> "The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title nor shall any error in classification invalidate or impair the copyright protection secured under this title." [Emphasis supplied]

A work of art is defined in 37 C.F.R., Sec. 202.10(a):

> "(a)...This class includes...works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, as well as works belonging to the fine arts, such as paintings, drawings and sculpture."

A reproduction of a work of art is defined in 37 C.F.R., Sec. 202.11:

> "This class includes published reproductions of existing works of art in the same or a different medium, such as a lithograph, photoengraving, etching or drawing of a painting, sculpture or other works of art."

The Snyder plastic Uncle Sam bank may be regarded as either a work of art or a reproduction of a work of art. While the Snyder registration specifies classification as a work of art, rather than as a reproduction of a work of art, that fact is immaterial as to the validity of the copyright. 17 U.S.C., Sec. 5, supra; Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366, 1368 (S.D.N.Y. 1969); affd., 415 F.2d 1007 (2 Cir. 1969); Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, 1094 (2 Cir. 1974); cert. den., 416 U.S. 986.

A reproduction of a work of art need only reflect "originality", "creativity" not being required. As stated in Nimmer on Copyright, Sec. 20.3, at page 95:

> "Secondly, as noted above, a work of art must evince some creativity while a reproduction of a work of art need not contain any creativity other than that which is inherent in the underlying work of art of which it is a reproduction. That is, the contribution made by the copyright claimant of the reproduction need not constitute creativity, although it must constitute originality."

See also Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776, 782 (n.2) (S.D.N.Y. 1968).

On the other hand, a work of art must "embody some creative authorship in its delineation or form" [37 C.F.R., Sec. 202.10(b)] to warrant copyright protection. Otherwise stated, a work of art

> "must evidence a minimal element of creativity in order to command copyright protection... The creativity required to constitute a work of art may be of a most humble and minimal nature." (Nimmer on Copyright, Sec. 19.1, at page 85)

As pointed out hereinafter, the Snyder Uncle Sam bank clearly embodies that originality requisite to sustain the copyright thereon as a reproduction of a work of art or, alternatively, both that originality and creativity requisite to sustain the copyright thereon as a work of art.

B. Snyder's Uncle Sam Bank has the Originality Required of a Copyrightable Reproduction of a Work of Art or a Work of Art

As discussed in Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5 Cir. 1972), the Copyright Act was enacted to

secure copyright to the writings of an "author". In Burrow-Giles Litho. Co. v. Sarony, 111 U.S. 53, 58 (1884) "an author" was defined as "he to whom anything owes its origin; originator, maker...". See Goldstein v. California, 412 U.S. 546, 561, 93 S. Ct. 2303, 2312 (1973). In Imperial, supra, the Court continues:

> "This authorship concept is no more than one facet of the essence of that which merits copyright protection - originality. However, while such originality is the test for copyrightability, it does not extend so far as to require that novelty or invention, which is the sine qua non for patent protection, be present. [Emphasis supplied.]"

In its landmark decision respecting the prerequisite of originality for copyright protection, Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 101-02 (2 Cir. 1951), this Court held that:

> " 'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author'. No large measure of novelty is necessary...All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'. Originality in this context 'means little more than a prohibition of actual copying'. No matter how poor artistically the 'author's addition, it is enough if it be his own'."*

* Novelty of design over the public domain is not what the copyright law requires; for patents yes, but in copyrights, an author is protected for his own artwork not for the inventiveness thereof. Alfred Bell & Co. v. Catalda Fine Arts, supra; Wihtol v. Wells, 231 F.2d 550, 553 (7 Cir. 1956). See Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897 (5 Cir. 1972).

Recently, in Puddu v. Buonamici Statuary, Inc., 450 F.2d 401 (2 Cir. 1971), this Court held a group of statuettes to be original and copyrightable over earlier public domain versions of virtually identical statuettes. The Court, in reversing Judge Tyler, observed:

> "Judge Tyler dismissed the Complaints on two independent grounds. He considered that the copyrighted statuettes were not sufficiently different from a 1963 uncopyrighted line as to possess the originality required for a copyright...." [450 F.2d, at 402].

Judge Tyler's dismissal was based upon precisely the same type of preliminary holding made in the present case. But this Court overruled Judge Tyler, holding that:

> "However, originality has been considered to mean 'only that the work owes its origin to the author, i.e. is independently created and not copied from other works.' [Citation deleted] Plaintiff's employee, Metcalf testified without contradiction that he had sculpted all the copyrighted statuettes 'from scratch'. While there is a strong family resemblance between the copyrighted and the uncopyrighted models, the differences suffice to satisfy the modest requirement of originality laid down by the Supreme Court in Bleistein v. Donaldson Lith. Co., 188 U.S. 239 (1903) and by this Court in Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2 Cir. 1951)...Originality sufficient for copyright protection exists if the 'author' has introduced any element of novelty as contrasted with the material previously known to him" [450 F.2d at 402; Emphasis supplied]

Originality requires no more than the input of some effort, skill and judgment and the avoidance of slavish imitation and direct copying.

In Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), the famous Rodin sculpture "Hand of God" was reproduced precisely by the copyright proprietor on an approximate one-half scale. As observed by Judge Ryan in that case:

> "However, to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another... Plaintiff has sustained this burden. Its copyrighted work embodies and resulted from its skill and originality in producing an accurate scale reproduction of the original." [177 F. Supp. at 267; Emphasis supplied]

Moreover, a significant measure of artistic creation is not necessary for originality. As stated by the Court in Pantone, Inc. v. A. I. Friedman, Inc., 294 F. Supp. 545 (S.D.N.Y. 1968):

> "The foregoing principles [referring to the Alfred Bell case] have been repeatedly affirmed in decisions holding that the test for determining copyrightability is originality (i.e., independent creation or individuality of expression) rather than novelty, and that originality of even the slightest degree, even if it amounts to no more than a rearrangement of age old ideas, is sufficient." [294 F. Supp. at 548; citations omitted and emphasis supplied.]

So too, in Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965), the Court found that a reproduction of a hobby horse, admittedly in the public domain, was "original" within the meaning of the law of copyright. What is quite interesting in that case is that the plaintiff (copyright owner) accused the defendant of infringement for having copied the plaintiff's copyrighted modification of the defendant's own previous version of the hobby horse. The Court observed that:

> "The fact that plaintiff took a matter admittedly in the public domain, (i.e., a horse) does not in and of itself preclude a finding of originality, since plaintiff may have added unique features to the horse, enlarged it and made it sufficiently dissimilar from defendant's horse as to render it copyrightable to plaintiff [citing Alva Studios, Inc. v. Winninger, inter alia]". [268 F. Supp., at 421-22]

Nor does the fact that a work is but a direct reproduction of a prior work negate the originality requisite for copyright protection. Thus, in Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), a precise scaled-down copy of the Rodin "Hand of God" sculpture was validly copyrighted. Similarly, in Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366 (S.D.N.Y.); affd., 415 F.2d 1007 (2 Cir. 1969), the District Court noted, with respect to a copy of a flower pattern in the public domain, that:

> "Even if nothing were added and the reproduction were an exact copy of the design, still the design or an exact copy of it could have been copyrighted as a work of art." [295 F. Supp. at 1367; Emphasis supplied]

To the same effect are Peter Pan Fabrics Inc. v. Dixon Textile Corp., 280 F.2d 800, 802 (2 Cir. 1960), wherein a copyright on a design incorporating ancient Byzantine public domain designs was held valid; Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1153-54 (N.D. Ill. 1972), wherein a copyright on statuary which closely reproduced pictures in a publication was held valid; Allegrini v. De Angelis, 59 F. Supp. 248, 250 (E.D. Pa. 1944); affd., 149 F.2d 815 (3 Cir. 1945), wherein a

copyright on a precise, somewhat smaller copy of a religious shrine which was in the public domain was held valid; Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284, 286-87 (6 Cir. 1971), wherein copyrights on precise models of large military airplanes were held valid; and Doran v. Sunset House Dist. Corp., 197 F. Supp. 940, 944 (S.D. Cal. 1961); affd., 304 F.2d 251 (9 Cir. 1962), wherein a copyright on a Santa Claus figure was held valid. In Doran, for example, the Court recognized that the copyrighted work incorporated the familiar public domain elements of the Santa Claus figure finding, nevertheless, that:

> "In the instant case, plaintiffs have reproduced the familiar figure of Santa Claus in a three-dimensional, plastic form. Therefore, the question is whether this medium of expression [the form selected by the copyright owner] is sufficiently original to support the granting of the copyright....
>
> "here, plaintiffs first envisioned and then created by their own skill, labor and judgment, a Santa Claus in the form of a three-dimensional figure made of plastic. It is true, of course, that plaintiffs' Santa has all of the traditional features which go to make up Santa Claus, viz., the red suit and cap with white fur trim, the white hair and beard, the black belt and boots, the ruddy face and fat form. These features are part and parcel of the 'idea' of Santa Claus and hence are not copyrightable. However, the originality here lies in the form - three-dimensional - and the medium - plastic - which plaintiffs have used to express the idea of Santa Claus. As far as the record reveals, plaintiffs were the first to reproduce the traditional character in this particular form and medium." [197 F. Supp. at 944; Emphasis supplied]

Further authorities noting the measure of originality warranting copyright protection are cited in the margin.* Measured by the standards of any of these precedents, the Snyder Uncle Sam Bank meets the test of originality.

First, the multiple steps involved in the creation of the Snyder work from the original antique metal bank, involving the successive preparation of (1) sketches from the 11-inch high article (A-38, para. 12), (2) a first reduced size clay model (10 inches in height) therefrom (A-38, para. 13), and (3) a yet further modified and reduced size (9 inches in height) prototype (A-38-39 paras. 13-15) from which the (4) mold for the copyrighted work was prepared (A-39, para. 15), clearly evince the exercise of sufficient effort, skill and judgment, i.e. authorship, as to meet the requirement of "originality". Not only has Snyder himself

*Dan Kasoff, Inc. v. Novelty Jewelry Co., 309 F.2d 745, 746 (2 Cir. 1962); Millworth Conv. Corp. v. Slifka, 276 F.2d 443 (2 Cir. 1960); Rushton v. Vitale, 218 F.2d 434, 435 (2 Cir. 1955); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5 Cir. 1972); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9 Cir. 1970); Best Medium Publ. Co. v. National Insider Inc., 385 F.2d 384, 386 (7 Cir. 1967); Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143, 146-47 (7 Cir. 1963); Wihtol v. Wells, 231 F.2d 550, 553 (7 Cir. 1956); Concord Fabrics, Inc. v. Generation Mills, Inc., 169 USPQ 470 (S.D.N.Y. 1971); Covington Fabrics Corp. v. Artel Prod. Inc., 328 F. Supp. 202, 204 (S.D.N.Y. 1971); Prestige Floral v. California Artificial Flower Co., 201 F. Supp. 287 (S.D.N.Y. 1962); Royalty Designs, Inc. v. Thrifticheck Serv. Corp., 204 F. Supp. 702, 704 (S.D.N.Y. 1962); Peter Pan Fabrics Inc. v. Acadia Co., 173 F. Supp. 292, 299 (S.D.N.Y. 1959); Scarves by Vera, Inc. v. United Merchants, 1973 F. Supp. 625, 627 (S.D.N.Y. 1959); Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955); Ziegelheim v. Flohr, 119 F. Supp. 324, 327 (E.D.N.Y. 1954); Amplex Mfg. Co. v. A.B.C. Plastic Fabr., Inc., 184 F. Supp. 285, 287 (E.D. Pa. 1960); Trebonik v. Grossman Music Corp., 305 F. Supp. 339, 346 (N.D. Ohio, 1969); Blumcraft of Pittsburgh v. Newman Bros., Inc., 159 USPQ 166, 173 (S.D. Ohio 1968).

stated that these steps occurred, but expert witnesses, Mr. Bloch called by Batlin and Mr. Wurmbrand called by Snyder, indicated that these steps must have taken place (Bloch, A-62, li. 9-20; A-63, li. 19 - A-64, li. 22; Wurmbrand, A-91, li. 5-15; A-92, li. 20 - A-94, li. 12. Certainly, Snyder's efforts were significantly greater than the "slavish copying" which the copyright act does not reward. Prestige Floral, S.A. v. Calif. Artificial Flower Co., 201 F. Supp. 287, 291 (S.D.N.Y. 1962); Contemporary Arts, Inc. v. F. W. Woolworth Co., 93 F.Supp. 739, 742 (D.Mass. 1950), aff'd., 193 F.2d 162 (1 Cir. 1951), aff'd. 344 U.S. 228, 73 S.Ct. 222 (1952).

Secondly, the degree of changes made in the Snyder Uncle Sam bank from the original ninety year old antique metal bank, comprising the modifications in proportions, shape and appearance of the Uncle Sam figure, the adjacent satchel and the eagle decoration on the supporting pedestal (see pages 6-8, supra) are further evidence of the significant artistic effort involved and of the authorship and originality of the Snyder work. Puddu v. Buonamici Statuary, Inc., 450 F.2d 401, 402 (2 Cir. 1971); Doran v. Sunset House Dist. Corp., 197 F. Supp. 940, 944 (S.D. Calif. 1961); affd., 304 F.2d 251 (9 Cir. 1962); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416, 421-22 (S.D.N.Y. 1965).

Finally, Snyder's efforts in reproducing the antique metal Uncle Sam bank in esthetically pleasing form in a new material and on a reduced scale further demonstrate the originality of the copyrighted work. Alva Studios Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); Doran v. Sunset House Dist. Corp., 197 F. Supp. 940, 944 (S.D. Calif. 1961); affd., 304 F.2d 251 (9 Cir. 1962); Allegrini v. De Angelis, 59 F. Supp. 248, 250 (E.D. Pa. 1944); affd., 149 F.2d 815 (3 Cir. 1945); Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284, 286-88 (6 Cir. 1971).

For each of the preceding reasons it is submitted that, as a matter of law, the copyrighted work here in issue meets the test of originality for a reproduction of a work of art.

C. The Snyder Uncle Sam Bank Meets the Further Test of "Creativity" for a Copyrightable Work of Art

As pointed out hereinabove, to warrant copyright protection as a work of art, a work must additionally evidence some minimal element of creativity. The courts should not, however, substitute their personal judgment as to the worth or creative value of a work of art for that of those versed in the field. As stated by Mr. Justice Holmes, in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903):

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of ... [works copyrighted] outside of the narrowest and most obvious limits."

The creativity requirement was specifically considered by this Court in Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F.2d 409, 411 (2 Cir. 1970); cert. den., 401 U.S. 977, wherein the Court said:

> "Moreover, the required creativity for copyright is modest at best. It has been variously described as 'little more than a prohibition of actual copying' or something more than a 'merely trivial' variation, or 'enough' if it be the author's own, 'no matter how poor artistically' [Citations deleted].
>
> "Plaintiff's pansy design was created by its own staff. The configuration of the design, including such details as petals and leaves, required an appreciable amount of creative skill and judgment."

Similarly, in Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 281-82 (5 Cir. 1970); cert. den., 398 U.S. 928, the Court of Appeals for the Fifth Circuit overruled a District Court finding of lack of creativity - in issue was a simple filigree pattern which the District Court Judge had described as:

> "4. The filigree pattern is formed entirely of intercepting straight lines and arc lines." [159 USPQ, at 363]

The Court of Appeals noted that a work of art must have some minimal degree of creativity but, citing the statement by Justice Holmes in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903), held the work to be creative.

See also Ted Arnold Ltd. v. Silvercraft Co., 259 F.Supp. 733 (S.D.N.Y. 1966), wherein a simulation and miniaturization of an old antique telephone was held to satisfy the creativity requirement under the copyright law.

In light of the preceding authorities, it is clear that the Snyder Uncle Sam bank meets the creativity requirement for works of art. Manifestly, the artistic effort involved in the successive designing and sculpturing operations which produced a work differing in many respects from the antique, public domain Uncle Sam bank amount to that minimal creativity required for a work of art.

Snyder's expert Wurmbrand testified in the Court below that artistic skills were necessary to make any version of the antique metal Uncle Sam bank in reduced proportions (A-91-93):

> "Q I direct your attention to Plaintiff's Exhibit 1, the metal bank, and ask if you wish to make a smaller version of Plaintiff's Exhibit 1, a smaller version, any smaller version, what are the steps that you would go through?"
>
> ***
>
> "A I would have to make a drawing, and from there I have to go and sculpt a model, an exact model of whatever it is, reduced in size, and from there we are going to cast, decide on what process we are going to do in order to make a mold, either by pantographing or by casting it" (A-91, li. 5-15).
>
> ***
>
> "Q Is there ere any way to make a reduced size of Plaintiff's Exhibit 1 without some sculpture operation being involved?
>
> "A No.

"Q You must sculpt?

"A Yes.

"Q Must you make a model to go from a larger size to a smaller size?

"A. Yes. It is sculpture work.

"Q You must do sculpture work.

"A Right.

"Q Must the person be a trained sculptor or artist to make a sculpture?

"A You have to be an artist. A model maker cannot do this type of work. You have to be an artistic model maker." (A-92, li. 20 - A-93, li. 9)

Further, the expert testified that in his opinion the exercise of artistic [creative] skills was necessary to reproduce the antique metal Uncle Sam bank in the form of Snyder's plastic Uncle Sam bank (A-93, li. 10 - A-95, li. 9):

"Q I direct your attention to Plaintiff's Exhibit 1, the metal bank, and ask you to compare it with Plaintiff's Exhibit 2, the plastic bank, and ask you in your opinion what were the steps that were followed, going from the metal bank to the plastic bank?

"A Well, I can guess the steps. But if I were going to make it --

"Q I ask you what you think the steps were that were performed.

"A They went ahead and they made a new model, a new sculpture, reduced in size into new proportions.

"Q You say 'into new proportions'?

"A Right. They changed some of the designs in order to fit plastic. They changed some of the detail work, and from there they proceeded into making the mold.

"Q Must the persons who made this have made a sculpture when they reduced from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2?

"A The model has to be made by a sculptor. It is not a symmetrical model that you can go by dimension. You have to have the free hand of an artist in order to carve out the detail, even if it is a copy.

"Q Is it your testimony that even if it is an exact copy you must have a model maker, is that correct?

"A Yes.

"Q Could a layman make an exact copy in smaller size?

"A No.

"Q In your opinion, I want your opinion, is Plaintiff's Exhibit 2 an original artistic work compared with Plaintiff's Exhibit 1?

"A It depends what you call original.

"Q Of course it does. What is your definition of an original work?

"A Original -- I would call it an original artistic work, but I wouldn't call it a new design.

"Q It is an original artistic work but not a new design.

"THE COURT: Original artistic simply because it is smaller?

"THE WITNESS: Because it is smaller and because they changed a lot of detail in it which you cannot just take by copying it down and reducing it from a large part to a small part.

"THE COURT: Some of it was done because they were going to use plastic?

"THE WITNESS: Also because of esthetics. Maybe the artist who made the small one decided that he doesn't like this kind of shape and he changed it."

Snyder does not now and never has denied that the antique cast metal Uncle Sam bank which has been in the public domain for many years was utilized as the inspiration for the copyrighted plastic Uncle Sam bank here in issue. Snyder did not, however, merely "copy" the antique work but exercised at least that minimum measure of originality and creativity requisite under the law for a copyrightable work of art.

D. The Court Below Abused its Discretion by Concluding that the Copyright in Issue is Invalid and Granting a Preliminary Injunction Barring its Assertion

In the present proceedings on Batlin's Motion for Preliminary Injunction the assertions made in Snyder's proofs (i.e., in the Snyder Affidavit and in the testimony of the expert, Daniel Wurmbrand) must be taken as true. Cf., Goodson-Todman Enterprises, Ltd. v. Kellogg Co., 358 F. Supp. 1245, 1246 (C.D. Cal. 1973). That being the case, the present record clearly establishes both the originality and creativity of the copyrighted work here in issue.

The lower court's threshold conclusion of the probability of Batlin's success after trial on the merits is obviously premised upon its erroneous conclusion in the related Mishan proceeding that "there is no original idea here... This idea is clearly in the public domain and is the same creative idea that exists in the antique banks." That premise is, as a matter of law, erronous.

The lower court's grant of a preliminary injunction precludes Snyder from asserting his copyright during the very period in which it is of commercial value since, as previously indicated, the Snyder plastic Uncle Sam bank is being specifically marketed (both by Snyder and by the copyright infringers) as a U.S. Bicentennial novelty Accordingly, the preliminary injunction granted by the lower court does not preserve the status quo but indeed, in reality, destroys Snyder's proprietary rights and moots further proceedings.

It is believed that the lower court has indulged in a layman's judgment of artistic merit, contrary to Mr. Justice Holmes' warning in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). That judgment goes to the very essence of the validity of the copyright here in issue, was a manifest abuse of the Court's discretion and should, therefore be overturned.

CONCLUSION

For the preceding reasons it is urged that the Snyder Uncle Sam bank is, prima facie, the subject of a valid copyright, that Batlin failed below to meet its burden of showing the probability of its success in invalidating the copyright after a trial on the merits, and that the lower court abused its discretion by granting the preliminary injunction enjoining the assertion thereof. Accordingly, it is respectfully submitted that this Honorable Court should vacate the District Court's Order

dated May 16, 1975 and remand this matter to the lower court for the completion of discovery and prompt trial on its merits.

New York, New York
June 9, 1975

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A 262 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

- against -

JEFFREY SNYDER, etal.,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York** *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 9th *day of* June *1975 at* **521 Fifth Ave, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Jacobs & Jacobs

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 9th
day of June *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-0470750
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1976

James Steele

JAMES STEELE